No. 16-186

In the Supreme Court of the United States

ARLEN FOSTER AND CINDY FOSTER, PETITIONERS

v.

THOMAS J. VILSACK, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
JOHN C. CRUDEN
Assistant Attorney General
JENNIFER S. NEUMANN
MATTHEW LITTLETON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals erred in upholding, on arbitrary-and-capricious review, the determination of the United States Department of Agriculture (USDA) that a particular tract of petitioners' land qualifies as a "wetland" under 16 U.S.C. 3801(a)(27), as interpreted by 7 C.F.R. 12.31(b)(2)(ii).

2. Whether the USDA violated petitioners' due process rights in concluding that the particular tract of land is a wetland under 16 U.S.C. 3801(a)(27), where petitioners had notice of the agency's proceedings, were provided with the data used by and reasoning of the agency, participated in a formal adjudication on the issue, appealed within the agency, and received two levels of federal judicial review.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

No. 16-186

ARLEN FOSTER AND CINDY FOSTER, PETITIONERS

v.

THOMAS J. VILSACK, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 820 F.3d 330. The opinion of the district court (Pet. App. B1-B36) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2016. On July 12, 2016, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including August 9, 2016. The petition for a writ of certiorari was filed on August 8, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Wetland Conservation Provisions of the Food Security Act of 1985 (FSA), Pub. L. No. 99-198, 99 Stat. 1354, farmers who convert wetlands for agricultural use, rather than preserving them, are

ineligible for certain benefits from the United States Department of Agriculture (USDA). In particular, a person who "produces an agricultural commodity on converted wetland, as determined by the Secretary," is "ineligible for loans or payments" from the USDA. 16 U.S.C. 3821(a)(2); see 16 U.S.C. 3821(c) (person who "converts a wetland * * * for the purpose, or to have the effect, of making the production of an agricultural commodity possible" also is ineligible for certain benefits).

The dispute in this case concerns whether certain land is a "wetland" under the FSA. The statute defines "wetland" as land that "(A) has a predominance of hydric soils[1]; (B) is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation[2] typically adapted for life in saturated soil conditions; and (C) under normal circumstances does support a prevalence of such vegetation." 16 U.S.C. 3801(a)(27); see 7 C.F.R. 12.2 (repeating that definition). The statute directs the Secretary of Agriculture to "delineate, determine, and certify all wetlands located on subject land on a farm." 16 U.S.C. 3822(a)(1). The Natural Resources Conservation Service (NRCS) is the component of the USDA that makes those determinations on behalf of the Secretary. 16 U.S.C.

---

[1] Hydric soils are "soils that, in an undrained condition, are saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation." 7 C.F.R. 12.2.

[2] Hydrophytic vegetation consists of "plants growing in water or in a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content." 7 C.F.R. 12.2.

3822(j); 7 C.F.R. 12.30. The NRCS has "developed scientific procedures used to test for and determine whether a site meets the wetland criteria." Pet. App. D3.

At issue here is the third part of the statutory definition of "wetland"—the requirement that the land supports a prevalence of hydrophytic vegetation "under normal circumstances." The phrase "under normal circumstances" reflects Congress's recognition that, once a wetland has been farmed, it "often will not exhibit hydrophytic vegetation," so that the NRCS must ask whether "hydrophytic vegetation would have been present but for the disturbance." H.R. Conf. Rep. No. 916, 101st Cong., 2d Sess. 909 (1990). A USDA regulation directs the NRCS to answer that question by using similar land that has not been altered as a proxy for the land at issue. Thus, "[i]n the event the vegetation on [the primary site] has been altered or removed," the agency "determine[s] if a prevalence of hydrophytic vegetation typically exists in the local area on the same hydric soil map unit under non-altered hydrologic conditions." 7 C.F.R. 12.31(b)(2)(ii).

2. a. Petitioners own and farm land in Miner County, South Dakota. Pet. App. A2. This case concerns the USDA's determination that Site 1, a 0.8-acre parcel of their land, is a wetland under the FSA. *Id.* at A3. Site 1 is a "prairie pothole," meaning that it is a shallow depression that normally has standing water for all or part of a growing season. *Id.* at A3 & n.2.

In 2002, petitioners asked the NRCS to determine whether their farm contained wetlands. Pet. App. A3; see 7 C.F.R. 12.6(c)(4). The NRCS certified Site 1 as a wetland. Pet. App. A3, D4-D5. Applying the three-

factor statutory definition of "wetland," see 16 U.S.C. 3801(a)(27), the NRCS determined that Site 1 met the first two factors because it contained a predominance of hydric soils and hydrophytic vegetation, Pet. App. E2, and experienced a degree of flooding or soil saturation sufficient to support a prevalence of hydrophytic vegetation, *ibid.*

The third factor—prevalence of hydrophytic vegetation under normal circumstances—was more difficult to assess because Site 1 had been farmed and therefore was not in its natural state. Pet. App. C4 (explaining that, because Site 1 had been farmed, "the remaining vegetation [was] insufficient or unreliable for making a hydrophytic vegetation determination"). In accordance with the regulation, the NRCS asked whether "a prevalence of hydrophytic vegetation typically exists in the local area on the same hydric soil map unit under non-altered hydrologic conditions." 7 C.F.R. 12.31(b)(2)(ii). To answer that question, the NRCS looked to a reference site in an adjacent county that also was a prairie pothole; "bore the same Tetonka hydric soils as Site 1 and contained similar wetland hydrology as Site 1"; was in the same "major land resource area" (MLRA)[3] as Site 1; and was on "an approved list of sites established as comparison sites due to their undisturbed nature." Pet. App. A9, B23, B30-B31. Using data from the reference site, the NRCS concluded "that the same plant community would exist on [Site 1] in the absence of human alteration," mean-

[3] MLRAs are "geographically associated land resource units" demarcated by NRCS scientists "after a consideration of characteristics such as their 'physiography, geology, climate, water, soils, and land use.'" Pet. App. B27 n.10 (quoting Administrative Record (A.R.) 403).

ing that Site 1 satisfied the third statutory factor. *Id.* at B22 (citation omitted); see 16 U.S.C. 3801(a)(27)(C).

Petitioners had asked the NRCS to use one of two reference sites they proposed. Pet. App. B28. But petitioners had "offered no evidence" that either of their proposed sites was "on the same hydric soil map unit [as Site 1] and under non-altered hydrologic conditions." *Id.* at B29 (citation and internal quotation marks omitted). The NRCS's "visual assessment" of both sites revealed that "[m]ost of the onsite vegetation was unidentifiable" because it had been recently "cropped, hayed, grazed, and/or sprayed." *Id.* at B28-B29. The NRCS concluded that these substantially disturbed sites could not help the agency identify the vegetation that would typically exist on Site 1. *Id.* at A9, C25.

b. Petitioners appealed the NRCS's wetland certification to USDA's National Appeals Division (NAD), which conducted a formal adjudication. Pet. App. A3. Petitioners and the NRCS were allowed to present evidence and to cross-examine witnesses. *Ibid.*

The NAD hearing officer upheld the NRCS's determination that Site 1 is a wetland under the FSA. Pet. App. D1-D26. After reviewing the scientific evidence, the hearing officer concluded that Site 1 satisfies all three statutory criteria and that the NRCS had "followed proper procedures" in reaching that conclusion. *Id.* at D11-D23. With respect to the third factor, the hearing officer noted that, when "vegetation has been altered or removed, NRCS will determine if a prevalence of hydrophytic vegetation typically exists on this area by the use of a comparison site." *Id.* at D20. The hearing officer further explained that, under 7 C.F.R. 12.31(b)(2)(ii), a comparison site must

"support similar hydrologic conditions, be in the local area, have the same hydric soil map unit and be unaltered." Pet. App. D21. The hearing officer concluded that the NRCS's chosen reference site "meets these requirements" because "both sites have the same soil type (Tetonka)" and the reference site is "unaltered"; because both sites "have similar hydrology"; and because the reference site is nearby in the same MLRA and therefore is in the "local area." *Ibid.* The hearing officer concluded that two other potential reference sites suggested by petitioners did not meet the regulatory requirements because there was "no evidence" that those sites had the same soil map or supported similar hydrologic conditions. *Id.* at D23.

c. Petitioners appealed to the NAD director's office. Pet. App. A4; see 7 C.F.R. 11.6(a)(3).

The deputy director upheld the hearing officer's decision. Pet. App. C1-C29. The deputy director concluded that the NRCS's determination that Site 1 is a wetland was supported by substantial evidence and consistent with applicable regulations, and that the NRCS had followed proper procedures in making that determination. *Id.* at C1-C2, C17.

Petitioners made two arguments on appeal. First, they contended that the NRCS had failed to establish that Site 1 met the second wetland factor (wetland hydrology). Pet. App. C17. The deputy director rejected that argument, explaining that the NRCS had visited the site and taken soil samples, and that the NRCS had permissibly relied on multiple years of aerial photography that showed wetland signatures consistent with wetland hydrology. *Id.* at C20-C23.

Second, petitioners argued that the NRCS had used an incorrect reference site in assessing the third

wetland factor (prevalence of hydrophytic vegetation under normal circumstances). Pet. App. C17. The deputy director rejected that argument. *Id.* at C24-C28. As relevant here, the deputy director explained that the reference site "met all criteria" in the regulation, including that it was in the same "local area" as Site 1. *Id.* at C26-C27. The deputy director explained that the NRCS has interpreted the term "local area" in 7 C.F.R. 12.31(b)(2)(ii) as "within the same major land use area," and he upheld that interpretation as reasonable. Pet. App. C27 (citing *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997)).

3. Petitioners filed suit in federal district court under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* They argued that the agency's determination that Site 1 is a wetland was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Pet. App. B1, B3-B4. The district court granted the government's motion for summary judgment and denied petitioners' motion for summary judgment. *Id.* at B1-B36.

Petitioners did not challenge the agency's determination that Site 1 met the first factor for characterization as a wetland. Pet. App. B10. On the second factor, petitioners contended that the NRCS had erred in using aerial photography to establish that Site 1 had wetland hydrology. *Id.* at B17. In rejecting that argument, the district court noted that the government's expert had explained how the NRCS identified wetland signatures on several years' worth of photographs to establish the hydrology factor, and that petitioners had not cross-examined the expert or otherwise challenged the NRCS's evidence by, for example, "presenting their own expert witness to analyze the

photographs." *Id.* at B19. The court found petitioners' "hindsight effort to undermine the credibility of the agency's witness and the aerial photography" to be "unpersuasive." *Id.* at B20.

On the third factor, petitioners did not dispute that the vegetation on Site 1 had been altered or removed, so that it was necessary to look to a reference site to determine whether Site 1 would support hydrophytic vegetation under normal circumstances. Pet. App. B23-B24. Although petitioners disputed the NRCS's choice of reference site, the district court upheld that choice, explaining that it met all requirements in the regulation, including that it be in the same "local area" as Site 1. *Id.* at B26-B32. The court explained that defining a "local area" is a "complex matter[] within [the NRCS's] area of expertise"; that the NRCS had articulated its interpretation in a written report as well as through an expert witness; and that petitioners had declined to cross-examine that witness or to "specify an alternative definition for the 'local area' language." *Id.* at B31 (citation omitted); see *id.* at B27, B30-B31. The court upheld the NRCS's decision not to use petitioners' proposed reference sites because those sites did not meet at least two of the regulatory requirements. *Id.* at B29.

4. The court of appeals affirmed. Pet. App. A1-A10. Petitioners argued on appeal that the agency had erred (1) in interpreting aerial photographs to conclude that Site 1 met the second wetland factor (wetland hydrology), Pet. C.A. Br. 21-23, 29-35; and (2) in its choice of a reference site for evaluating the third wetland factor (hydrophytic vegetation), *id.* at 24-29. Petitioners' briefs did not make any due process argument and did not mention *Auer* deference.

The court of appeals first rejected petitioners' challenge to the use of aerial photographs to establish wetland hydrology. Pet. App. A6-A8. The court explained that, although petitioners "generally acknowledge[d] the legitimacy of using aerial photographs," they contended that the NRCS had erred in interpreting the photographs in this case. *Id.* at A6-A7. The court upheld the NRCS's interpretation, explaining that an NRCS expert had testified that she identified recognized signatures on the photos that establish wetland hydrology and that petitioners "did not cross-examine" this witness. *Id* at A7. The court concluded that this "unchallenged testimony" supported the agency's wetland hydrology finding. *Id.* at A8.

The court of appeals then rejected petitioner's argument that the agency had chosen an impermissible reference site when assessing hydrophytic vegetation. Pet. App. A8-A10. The court noted that, when the vegetation on a site has been altered or removed, "as was the case here because [petitioners] tilled the pothole located at Site 1," the regulation permits the NRCS to "use a comparison site in the local area which contains the same soil type as [Site 1]" to determine whether Site 1 would support hydrophytic vegetation under normal circumstances. *Id.* at A8-A9. Here, the court explained, the site chosen by the NRCS was "a prairie pothole similar to Site 1" and met the requirements in the regulation: it was "on the same hydric soil map unit" as Site 1; it had not been altered; and it was in the same "local area" as Site 1 because it was in the same MLRA. *Id.* at A9-A10 (citation omitted). The court noted that petitioners had not established that the two sites they proposed met the regulatory requirements. *Id.* at A9. The

court also rejected, as "unsupported by any authority," petitioners' argument that the NRCS's reference site was not within "the local area" of Site 1. *Id.* at A10. The court explained that the "unchallenged testimony" of an NRCS biologist established that the USDA "interpreted the 'local area' * * * to mean the same MLRA as the disputed site," and the court deferred to that "reasonable interpretation." *Ibid.*

ARGUMENT

The court of appeals correctly upheld the agency's determination that a small portion of their land is a wetland under 16 U.S.C. 3801(a)(27). The court's fact-specific decision is correct and does not conflict with any decision of this Court or another court of appeals. Although petitioners now contend that the court of appeals used the wrong legal standard for determining whether to defer to an agency's interpretation of its own regulation, petitioners did not make any such argument below. Nor did petitioners argue below that the agency's use of certain data in its wetland determination violated the Due Process Clause. In any event, those arguments lack merit. Further review is not warranted.

1. a. The court of appeals correctly upheld, on arbitrary-and-capricious review, the NRCS's determination that Site 1 is a "wetland" within the meaning of 16 U.S.C. 3801(a)(27). The statute identifies three characteristics of a "wetland": (1) a "predominance of hydric soils"; (2) wetland hydrology, meaning that the land "is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions"; and (3) a prevalence of hydrophytic vegetation "under normal

circumstances." *Ibid.* The NRCS visited Site 1, reviewed scientific evidence, and followed established procedures before concluding that all three requirements were met. That determination "require[d] a high level of technical expertise." Pet. App. B5 (citations and internal quotation marks omitted). The district court and court of appeals carefully reviewed the administrative record and upheld the agency's determination on arbitrary-and-capricious review. *Id.* at A1-A10, B1-B36.

In this Court, petitioners dispute the agency's conclusion only with respect to the third factor. See Pet. 11 n.8. A USDA regulation provides that, when "the vegetation on [the primary site] has been altered or removed," the agency assesses that factor by "determin[ing] if a prevalence of hydrophytic vegetation typically exists in the local area on the same hydric soil map unit under non-altered hydrologic conditions." 7 C.F.R. 12.31(b)(2)(ii). Petitioners do not challenge the validity of that regulation. Instead, they argue (Pet. 5-8, 21) that the agency's chosen reference site is not in the same "local area" as Site 1. As the courts below explained, the agency has permissibly interpreted "local area" to mean the same MLRA. Pet. App. A9-A10, B27-B28. The agency explained that definition in its written decision and through an expert witness at a hearing, and petitioners neither cross-examined that witness nor offered a competing definition. *Id.* at B27, B30-B31.

The agency's interpretation is reasonable and consistent with the regulation's purpose of identifying an apt proxy for a site whose own physical characteristics have been altered by agricultural use. The regulation requires that an appropriate reference site be in the

"local area"; on "the same hydric soil map unit"; and "under non-altered hydrologic conditions." 7 C.F.R. 12.31(b)(2)(ii). The agency's definition of one of those terms—"local area"—permissibly relies on existing administrative divisions of land, called MLRAs, which group land that has similar "physiography, geology, climate, water, soils, and land use." Pet. App. A2, B27 n.10 (quoting Administrative Record (A.R.) 403). The United States is divided into hundreds of MLRAs, including 18 MLRAs located wholly or partially in South Dakota. See USDA Handbook 296, *Land Resource Regions and Major Land Resource Areas of the United States, the Caribbean, and the Pacific Basin* (2006), http://go.usa.gov/xKkeP. The agency uses this objective metric to identify an area of land within which the agency can look for a reference site. See Pet. App. B31. Petitioners' inability to offer any practicable alternative underscores the reasonableness of the agency's approach.

b. Petitioners contend (Pet. 13-25) that the court of appeals erred in deferring to the agency's interpretation of its regulation because a court should not defer to "an interpretative field manual." Pet. i. This argument is flawed in two respects. First, in the administrative proceeding, the agency interpreted its regulation directly, rather than relying on a manual that allegedly interprets that regulation.[4] The decision of

[4] Petitioners urged the district court to defer to a different agency manual, the USDA's National Food Security Act Manual (USDA Manual). Pet. App. B27. But as the district court explained, the USDA Manual does not define "local area"; it "merely restates the same regulatory language found in 7 C.F.R. § 12.31(b)(2)(ii)" and thus provides "nothing for the court to defer to." *Id.* at B28. Petitioners made no argument about manuals in the court of appeals.

the court of appeals does not even mention an agency manual, much less defer to the agency's construction of one.

Second, petitioners did not make any argument to the court of appeals about the legal standard for deferring to an agency's interpretation of its own regulation. Indeed, their briefs did not even cite *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). Petitioners argued that the NRCS's choice of a reference site was "not a reasonable interpretation of USDA's regulation" (Pet. C.A. Br. 28; see *id.* at 29), but they did not dispute the general proposition that courts should defer to an agency's reasonable interpretation of its own rule. See *Auer*, 519 U.S. at 461 (Secretary's interpretation is "controlling unless plainly erroneous or inconsistent with the regulation") (citation and internal quotation marks omitted); see also, *e.g.*, *Decker* v. *Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013). And even now, petitioners "do[] not ask the Court to reconsider *Auer*." Pet. 14. The court of appeals stated

---

In their certiorari petition, they make a new argument, contending that a USDA Circular required the agency to use a reference site "adjacent" to Site 1. See Pet. 5-7, 28, 30 n.16. That argument should not be considered by this Court in the first instance. In any event, it lacks merit because the USDA Circular provision upon which petitioners rely is inapplicable. The NRCS has "several options" for "making a decision on the hydrophytic vegetation factor," and "adjacent vegetation * * * is only one" of those options. Pet. App. K2 (emphasis omitted). Here, the agency did not rely on data from adjacent sites because "soil samples revealed differences in the hydric soil content within a short distance from Site 1." *Id.* at B29. Instead, the agency used "data from [an] NRCS reference site[]" that was "in the local area on the same hydric soil map unit under non-altered hydrologic conditions," as the regulation and the USDA Circular permit. A.R. 466 (USDA Circular ¶ 5-31) (internal quotation marks omitted).

that it was deferring to the agency's reasonable interpretation of its own regulation, Pet. App. A10, but it did not resolve any legal question about when such deference is appropriate because petitioners did not present any such question. Accordingly, this case does not raise any question about the circumstances under which courts should apply *Auer* deference.[5]

Instead, this case presents a fact-specific question about whether a particular reference site was a reasonable proxy for Site 1. Applying its technical expertise, the agency chose a site within 33 miles of Site 1 that had important similarities to Site 1 (including that it was a prairie pothole) and met the regulatory requirements (because it was in the same local area, had the same soil type as Site 1, and was unaltered). Pet. App. B23, B25-B26. The two sites petitioners suggested did not meet the regulatory requirements. *Id.* at A9, B28-B29. Further review of the agency's fact-specific conclusion is not warranted.

2. Petitioners also contend (Pet. 26-31) that the agency violated the Due Process Clause by selecting a reference site for Site 1 without affording petitioners adequate notice and an opportunity to be heard, and by selecting a reference site that had previously been

---

[5] Contrary to petitioner's suggestion (Pet. 24-25), whether a particular site is a "wetland" under the FSA does not depend on whether it is part of the "waters of the United States" under the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.* Compare 16 U.S.C. 3801(a)(27) (FSA) with 33 U.S.C. 1362(7) (CWA). In determining whether a site is a "wetland" under the FSA, the USDA Manual adopts some of the scientific procedures in an Army Corps of Engineers Manual. See Pet. App. C6. But the determination whether a particular water body is covered by the CWA is "made independently of procedures described in" the Corps Manual. A.R. 486 (Part I, ¶ 4).

identified as supporting hydrophytic vegetation. That argument was never raised below, and it lacks merit.

a. Petitioners never argued below that the agency violated their due process rights in selecting a reference site. In their appellate briefs, petitioners did not cite the Due Process Clause or any decision interpreting it, and the court of appeals did not address any due process argument. Cf. Pet. 13 n.9.[6] Because this Court is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), the Court should not consider petitioners' constitutional claim in the first instance.

b. Petitioners' due-process challenge lacks merit. The agency's task was to assess whether Site 1 meets the statutory definition of wetland, see 16 U.S.C. 3801(a)(27), and because Site 1 was not in its natural state, the agency had to identify a reference site that was in its natural state, see 7 C.F.R. 12.31(b)(2)(ii). To choose an appropriate reference site, the agency looked to a variety of factors, including that the site was similar to Site 1 (because it was a prairie pothole), was in the same soil map and local area, and was "under non-altered hydrologic conditions." 7 C.F.R.

---

[6] Petitioners argued in the district court that "the use of a predetermined wetland as a reference site" "allows the agency to conflate the separate requirements [of 16 U.S.C. 3801(a)(27)] that the land have a prevalence of hydric soil with the requirement that the land support a prevalence of hydrophytic vegetation." Pet. App. B24. The district court correctly rejected that statutory argument. *Ibid.* In the court of appeals, petitioners argued in passing that the agency should not have used a site on a preexisting list. Pet. C.A. Br. 27. But they again did not make any constitutional argument, and the court of appeals did not understand petitioners to be making any standalone argument based on the preexisting list. See Pet. App. A9.

12.31(b)(2)(ii). The agency had a preexisting list of sites that were undisturbed and therefore met the last regulatory requirement. See Pet. App. A9, C25-C26. The site the agency ultimately chose was on that list.

That does not mean that the agency simply chose a site from a preexisting list "to determine the outcome of a contested question." Pet. 29. Rather, the agency considered all of the requirements in the regulation in choosing an appropriate reference site for Site 1, and one factor it considered was the requirement that the site be in its natural state. Pet. App. A9-A10, B23. An agency expert explained that the agency had "establish[ed] an equivalence between the hydric soils found on Site 1 and the reference site" and had found a "connection between the hydrologic conditions on Site 1 and the reference site," and this testimony "went unchallenged." *Id.* at B25-B26.

The NRCS notified petitioners that it would use a reference site to assess hydrophytic vegetation, prompting them to "offer[] * * * comparison sites" on their farm for the agency's consideration. Pet. App. B28 & n.11. After assessing those sites and rejecting them as inappropriate, the NRCS issued a report explaining its choice of reference site. See A.R. 346. Petitioners took part in an administrative hearing and administrative appeal, see Pet. App. B20, and they invoked two levels of judicial review. Petitioners thus received ample notice and opportunity to be heard throughout the agency's decisionmaking process, including with respect to the selection of a reference site. See *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976). Further review of their fact-bound claim is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
JOHN C. CRUDEN
Assistant Attorney General
JENNIFER S. NEUMANN
MATTHEW LITTLETON
Attorneys

DECEMBER 2016